SUPREME COURT, U. S.
MAY 23 1967
JOHN F. DAVIS, CLE

IN THE

Supreme Court of the United States

October Term, 1967

No. ~~1419~~ 188

PAN CARGO SHIPPING CORP.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Pan Cargo Shipping Corp. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on February 27, 1967.

Opinions Below

The *per curiam* opinion of the United States Court of Appeals for the Second Circuit is reported at 373 F. 2d 525 and appears *infra* as Appendix B.

The opinion of the United States District Court for the Southern District of New York (Honorable Inzer B. Wyatt, D.J.) is reported at 234 F. Supp. 623, 1965 A.M.C. 2649, and appears *infra* as Appendix D.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was dated and entered on February 27, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented for Review

The United States Court of Appeals for the Second Circuit has ruled, in effect, that the United States Military Sea Transportation Service of the Navy Department ("MSTS") may properly cancel a Charter of an American vessel if MSTS, as Charterer, orders her to load at an Arab League port, and a ban on loading there imposed because the Vessel has called at Israel on a previous voyage is not lifted by the so-called "cancelling" date specified in the Charter.

This ruling not only contravenes the general maritime law of the United States, as announced in the decisions of this Court, but has the incidental effect of seriously restricting the foreign commerce of the United States with a friendly nation by encouraging compliance by American shipowners with the so-called boycott of Israel announced by the Arab League.

The following questions are presented for review:

1. Does the fact that an American Vessel has made a perfectly lawful prior voyage to Israel give MSTS, as Charterer, the right to cancel a Charter calling for loading at one or more "safe ports" in a wide area (here the Persian Gulf) on the ground that she was not an "arrived" vessel, "ready to load" by the cancelling date, even though she had in fact arrived at her loading berth and was in fact physically ready for loading, if a ban on loading be-

cause of the Israeli voyage, imposed by the local authorities shortly after her arrival, has not been lifted by the "cancelling date", where

(a) There were other Persian Gulf oil loading ports at which the Vessel could have been safely loaded without any such delay;

(b) MSTS had made no inquiries concerning the Vessel's itinerary on voyages made prior to the Charter;

(c) MSTS had made no provision in the Charter concerning the Vessel's prior history, and

(d) MSTS had adopted the policy of not taking into account previous Israeli trading in negotiating charters.

2. Does a provision of a Charter such as that described in "(1)", *supra*, requiring MSTS to load the Vessel at a "safe" port or ports refer to ports "without risk of loading interference from Arab boycott", as was held by the District Court, whose decree was affirmed by the Court of Appeals "for substantially the reasons detailed by Judge Wyatt [the District Judge]"?

3. Under the form of Charter here involved, is a shipowner required to give notice of readiness to load before laytime (the time allowed for loading without payment of demurrage) can commence, or does laytime commence as soon as the chartered vessel has become "all fast" at the loading berth to which the charterer has ordered her?

4. If, contrary to Petitioner's contentions, the chartered Vessel was not an "arrived" ship, "ready to load", within the meaning of the "cancelling clause" of the Charter, quoted *infra*, p. 5, was it because the port to which MSTS ordered the Vessel was not a "safe" port for the

chartered Vessel, and if it was not a "safe" port, was MSTS, as Charterer, obliged to order her to another port which would be "safe" for the chartered vessel?

Statement of the Case

Petitioner, an American shipowner, sued Respondent in admiralty, in the United States District Court for the Southern District of New York, to recover damages for wrongful cancellation of a charter party ("the Charter") and demurrage accruing under the Charter prior to the cancellation, amounting in all to $160,110.16, exclusive of interest.

Jurisdiction of the District Court was based upon 28 U.S.C. § 1333, conferring admiralty jurisdiction on the United States District Courts, and the Suits in Admiralty Act, 41 Stat. 525-528 (1920), as amended, 46 U.S.C. §§ 741-752. The relevant sections of the statutes are set forth in Appendix A.

Respondent filed a cross-libel in the amount of $4,219.44, for fuel supplied to Petitioner's vessel. Respondent's claim was not disputed, but Petitioner contended that the amount should simply be credited against Petitioner's claim.

The District Court dismissed the libel,* and gave Respondent a decree on its cross-libel. The decision was affirmed, *per curiam*, by the United States Court of Appeals for the Second Circuit. The amount of the decree on the cross-libel was then paid, and therefore review is sought only of the decision on the original libel.

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* The proceedings were concluded before the new Federal Rules of Civil Procedure became effective, and therefore the old admiralty terminology was used.

The Charter (Pan Cargo Exh. 4), is too lengthy to be set out in full in the Appendix, but the pertinent clauses are quoted *infra*. It is a contract between Petitioner, as Owner of the American Tanker NATIONAL PEACE, and the Military Sea Transportation Service of the Navy Department ("MSTS"), as Charterer, whereby MSTS agreed to ship, and Petitioner agreed to carry "black" (i.e., unrefined) petroleum products on two consecutive voyages, each from one or more "safe ports" in the Persian Gulf to various discharging ports in the Pacific area.

Clause 5 of the "Provisions of Master Tanker Voyage Charter Party," * attached to and forming part of the Charter provided:

> "If the Vessel is not ready to load by 4:00 p.m. (local time) on the cancelling date named in the voyage order issued hereunder, the Charterer shall have the option of cancelling the voyage order by giving the Owner notice of such cancellation within twenty-four (24) hours after the cancelling date; otherwise the voyage order shall remain in full force and effect."

Clause 6 of the "Provisions" ** read:

> "When the Vessel has arrived at the port of loading or discharge and is ready to load or discharge, a notice of readiness shall be tendered to the Charterer or its agent by the Master or Agent by letter, telegraph, wireless or telephone. The Vessel shall be deemed ready within the meaning of this clause whether she arrives during or outside of usual business hours, whether she is in or out of berth or whether or not she has ballast water or slops in her tanks. Laytime shall commence either at the expiration of six (6) running hours after tender of notice of readiness, Vessel in or out of berth, except that any delay to the Vessel in reaching her berth caused by the fault of the Vessel or Owner shall not

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* Hereinafter referred to as "Clause 5."

** Hereinafter referred to as "Clause 6."

count as used laytime; or immediately upon the Vessel's arrival in berth (i.e. finished mooring when at a sealoading or discharging terminal and all fast when loading or discharging alongside a wharf) with or without notice of readiness, whichever first occurs."

Clause 19 of the "Provisions" * provided, in pertinent part:

> "And neither the Vessel, her Master or Owner, nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: * * * arrest or restraint of princes, rulers of (sic) people * * *. No exemption afforded the Charterer under this Clause shall relieve the Charter to (sic) diminish its obligation for payment of any sums due the Owner under other provisions of this Charter."

The NATIONAL PEACE had formerly been called the MEMORY, and had on one voyage called at Haifa and Jaffa, Israel, under that name, while operating under a long term charter to a Swiss corporation for the carriage of petroleum products to Israel (R. 701). Shortly after the call, a Liberian flag vessel, owned by a company affiliated with Petitioner, had been renamed MEMORY (R. 701) and substituted for the American MEMORY as the performing vessel under the Swiss charter (R. 703). At about the same time, the name of the American MEMORY was changed to NATIONAL PEACE. All of the American flag vessels operated by National Shipping & Trading Co., Inc., operators of the NATIONAL PEACE, had either had "NATIONAL" as the first part of their names from the start, or had had their names so changed, except for one, the PANTOCRATOR, which, because she was named for the Deity, retained her original name (R. 234).

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* Hereinafter referred to as "Clause 19."

After the substitution, the Liberian MEMORY shuttled back and forth between oil loading ports in Iran and Elath, a new Israeli port on the Gulf of Aqaba (R. 294), the narrow body of water separating the United Arab Republic's Sinai Peninsula from the northwestern coast of Saudi Arabia, considered by the Saudi Arabians as part of their territorial waters (R. 152-153).

Prior (and subsequent) to the making of the NATIONAL PEACE Charter, MSTS had incorporated in certain "invitations to bid" a so-called "Haifa Clause", reading substantially as follows:

> "In event the vessel is prevented from loading in a Persian Gulf port by the local authorities because of the vessel having previously traded with Israel, the Charterer shall have the option either to cancel the Charter as of the date loading is refused, or to nominate another loading port and the expenses incurred thereby shall be for the Owner's account. Extra miles traveled steaming to the nominated port shall not be included in the computation of mileage as provided in the Adjustment of Freight Clause."

In the case of the NATIONAL PEACE, neither the "Invitation to Bid" nor the Charter contained any such clause.

There was never any representation, oral or written, express or implied, that the NATIONAL PEACE had never called at an Israeli port, nor did MSTS ever inquire as to the Vessel's past history. There was no secret about the Israeli call; it was one which any American vessel registered for the foreign trade had every right to make. The NATIONAL PEACE had been duly cleared by the United States Customs authorities for the voyage on which she had made the call.

At the time the NATIONAL PEACE Charter was made, it was MSTS' policy not to take into account, in negotiating charters, the fact that a vessel had previously traded with Israel. Gano, Dep., pp. 46, 47, Pan Cargo Exh. 18.

There are a number of oil loading ports in the Persian Gulf, including Abadan and Bandar Mashur (in Iran), Ras Tanura (in Saudi Arabia), Fao (in Iraq), Mina-ah-Almadi [or Mina al Ahmadi] (in Kuwait), Bahrein Island (a British protectorate at the time in question) and Umm Said (in Qatar Arabia) (R. 156-157; 379-381). Of these Ras Tanura, Fao and Mina-ah-Almadi [Mina al Ahmadi] are in Arab League countries; Abadan, Bandar Mashur, Bahrein Island and Umm Said are not.

MSTS first ordered the NATIONAL PEACE to load at Bahrein Island, but before she arrived there, ordered her to Ras Tanura instead. MSTS' option having been exercised by the nomination of Bahrein, Petitioner was under no obligation to agree to this change of orders, but nevertheless sent the Vessel to Ras Tanura without objection. R. 709.

On the night of December 17th, the NATIONAL PEACE arrived at Ras Tanura, where, pursuant to MSTS' instructions, she proceeded to "South Pier", to which she was made "all fast" at 2230 hours. R. 709.

Shortly thereafter, she was boarded by a Saudi Arabian "health officer", who called upon the Master to produce for examination, not only the Vessel's current log books, but also some old log books which had been left on board. While examining these, the "health officer" became excited (R. 710) and at 2350 hours ordered the Vessel to leave her berth and proceed to an anchorage. Bamberg Dep. 34 (Pan Cargo Exh. 9). Pursuant to these orders, the NATIONAL PEACE left South Pier at 0126 hours December 18th and proceeded to an anchorage 1.7 miles away.

At the end of the trial, Respondent introduced in evidence two documents (Government Exh. "HH" and "II") indicating that the *Liberian* MEMORY, not the *American* MEMORY, had been placed on a blacklist by two members of the Arab League, Lebanon and Iraq.

Although there had been a certain amount of newspaper talk that Arab League countries would blacklist vessels trading with Israel, it is significant that the *only* American vessel MSTS was able to show had *ever* actually been placed on any Arab blacklist, either before or after the NATIONAL PEACE incident, was the KERN HILLS. R. 152-154; Gov. Ex. "II". Like the *Liberian* MEMORY, the KERN HILLS had been using the Gulf of Aqaba in carrying cargoes to Elath, and had thus committed the unpardonable sin (in Arab eyes) of using waters claimed to be Saudi Arabian for the purpose of supplying Israel. R. 704.

There is not a shred of evidence indicating that the NATIONAL PEACE was under a disability of any sort whatsoever when she arrived at Ras Tanura. Nor was there any thought that there would be any difficulty in loading an MSTS cargo there, or at any other Persian Gulf port. R. 237; 243; 261; 280.

After the Saudi Arabian official had ordered the NATIONAL PEACE away from her loading berth, the Master made diligent efforts, through the local American Consulate, to have the ban on loading lifted. Equally diligent efforts were made by Petitioner, through the State Department in Washington (R. 724). Meanwhile, the NATIONAL PEACE came close to running out of fuel, which was sorely needed for refrigeration, lighting, sanitation and cooking. The Master therefore invoked the aid of MSTS in obtaining permission to replenish his supply of bunkers (R. 719), but the MSTS officers refused to assist him. Pan Cargo Exh. 11 (Cables of 1/1/58); Bamberg Dep. 49-50 (Pan Cargo Exh. 9); R. 721.

Finally, in desperation, the Master was obliged to steam toward Bahrein Light Vessel and hoist a distress signal. On January 2, 1958, the U.S.N.S. MASCOMA responded, but on orders of the NAVY DEPARTMENT, her Commanding Officer refused to supply the NATIONAL PEACE with more than 600 barrels of fuel, which were furnished to the Vessel at a rendezvous near the Light Vessel (R. 54). This quan-

tity was sufficient to enable the NATIONAL PEACE to reach Abadan (in Iran), where she took on board an additional 6,983 barrels. R. 723. Adverse weather conditions kept the Vessel at Abadan until January 6th, when she left to return to Ras Tanura. Bamberg Dep. 57-58 (Pan Cargo Exh. 9). Meanwhile Petitioner, on the same date (January 6th), received from MSTS a message (Pan Cargo Exh. 7) reading:

> "GOVERNMENT EXERCISES OPTION UNDER CLAUSE FIVE OF CONTRACT NUMBER MST 2919 AND HEREBY CANCELS CONTRACT DUE FAILURE OF NATIONAL PEACE TO PRESENT IN ACCORDANCE WITH TERMS OF CONTRACT AT NOMINATED LOADING PORT BY 5 JAN 1958 X VESSEL IS DELINQUENT AS FOLLOWS: FIRST, AT NO TIME DID VESSEL PRESENT READY IN ALL RESPECTS TO LOAD WITH CLEARANCES REQUIRED OF VESSEL BY CUSTOM OF LOADING PORT AND LAWS OF SAUDI ARABIA; SECOND, VESSEL AT NO TIME PRESENTED SEAWORTHY, FITTED AND READY FOR THE VOYAGE IN THAT IT WAS NOT BUNKERED FOR THE VOYAGE AND BUNKERS WERE NOT READILY AVAILABLE TO THE VESSEL AT LOADING PORT; THIRD, OWNERS NOT ENTITLED TO EXCEPTIONS CLAUSE AS INELIGIBILITY OF VESSEL FOR CLEARANCES BY SAUDI ARABIAN GOVERNMENT WELL KNOWN TO OWNER AT TIME OF CONTRACT AND UNKNOWN TO MSTS X IN VIEW THIRD ABOVE AND FACT GOVERNMENT ALWAYS READY LOAD CARGO BUT PREVENTED FROM DOING SO BY VESSEL NOT BEING CLEARED, GOVERNMENT MUST HOLD OWNERS LIABLE FOR ALL DAMAGE DUE FAILURE OF VESSEL TO PERFORM.
>
> COMMANDER MILITARY SEA TRANSPORTATION SERVICE"

Petitioner thereupon relayed the substance of this message to the Master and directed the NATIONAL PEACE to proceed in ballast to the United States, which she did, arriving at New York on February 9, 1958. Bamberg Dep. 58-59 (Pan Cargo Exh. 9).

Reasons for Granting the Writ

A review on writ of certiorari should be granted for the following reasons:

1. The ruling of the Court of Appeals, if permitted to stand, would seriously restrict the foreign commerce of the United States, and is therefore one of national significance transcending the importance of the decision to the Petitioner itself.

2. The decision of the Court of Appeals is in direct conflict with long-settled rules of maritime law, enunciated by this Court, in reliance upon which hundreds of charters of vessels are made every year.

1. National Importance of the Question Presented

While its loss has been heavy, Petitioner fully appreciates the fact that the Court is so over-burdened with matters of national urgency that it could not be expected to hear this case if it involved nothing more than an ordinary commercial dispute between a shipowner and a charterer.

Here, however, the decision which is sought to be reviewed will, if permitted to stand, not only leave the maritime law relating to the warranties of "safe port" and "safe berth" in a very muddled state, but will seriously restrict freedom of trade between the United States and a friendly foreign country.

No American tanker owner will be able to accept a charter to Israel unless he is willing to give up hope that he will ever be able to charter his ship to MSTS for loading in the Persian Gulf area without fear that MSTS might order his vessel to load at an Arab League port, and then cancel the charter if there is a delay because of the so-called "boycott" of Israel.

2. Conflict Between the Decision of the Court of Appeals and the Decisions of This Court

The ruling of the Court of Appeals is contrary to the decisions of this Court in *The Gazelle*, 128 U.S. 474 (1888) and *Mencke* v. *A Cargo of Java Sugar*, 187 U.S. 248 (1902), as will be shown *infra*.

Petitioner's primary contention is that as of the time the NATIONAL PEACE berthed at Ras Tanura, it appeared that permission to load could have been granted within such time as to make performance of the Charter possible, and that she was therefore "ready to load", and an "arrived" ship. If, however, as of the time she berthed, the NATIONAL PEACE had not "arrived" and was not "ready to load" because permission to load could not have been granted within such time, it would follow that Ras Tanura was not a politically "safe" port for the Vessel.

MSTS is thus impaled on the horns of a dilemma: If it appeared that the NATIONAL PEACE could have been granted permission to load within such time as would permit performance of the Charter, she was a "ready" ship upon her arrival at Ras Tanura; MSTS' option to cancel thereupon expired, and the cancellation was therefore wrongful. On the other hand, if she could not have been granted permission to load within such time, it was because MSTS had not ordered her to a port politically "safe" for the chartered vessel; MSTS should then have nominated an alternate loading port in the Persian Gulf, and having failed to do so, the cancellation was wrongful.

There was no frustration of the Charter; in fact, MSTS has never contended that there was one. Its defense rested on its alleged right to exercise its option to cancel when permission to load had not been granted by the "cancelling date".

Clause 6 contemplates two possible situations: the first where the chartered vessel is obliged to wait at an anchorage until her designated loading berth is ready, and the second where the loading berth is ready when she arrives at the loading port. When a berth is not immediately available, the Master is entitled to trigger the commencement of laytime (*i.e.*, the time allowed a voyage charterer to load or discharge the chartered vessel, R. 731) by tendering a notice of readiness as soon as his vessel arrives within the confines of the loading port. In that case, laytime will commence at the expiration of six running hours thereafter, even though days or weeks may elapse before a berth is available. Where, however, the designated loading berth is available immediately (or in less than six hours after arrival in port), laytime will commence the instant the vessel is made "all fast" at the berth, whether or not a notice of readiness has been tendered. The learned Trial Judge was plainly in error in concluding that a notice of readiness is necessary under this form of clause, even when the vessel berths immediately.

Petitioner urges that the NATIONAL PEACE was in fact a "ready" ship when she arrived at Ras Tanura and was made fast at the loading berth to which she had been ordered by MSTS. The immediate effect of berthing was two-fold: MSTS' option to cancel under Clause 5 thereupon expired, and laytime commenced running under Clause 6.

MSTS itself interpreted Clause 6 as meaning that if she is in fact seaworthy, a vessel is an "arrived" vessel and is to be deemed "ready to load" from the moment she is "all fast" at her designated loading berth. R. 143-144; 375.

The District Court specifically found that "neither side [was] really at fault", but nevertheless held that the loss should be borne by Petitioner, which knew that the Vessel had called at Israel, rather than by MSTS, which

did not. Presumably the Court of Appeals was of the same view.

Petitioner maintains that even if the NATIONAL PEACE had been on a Saudi Arabian blacklist before her arrival there, she would still have been an "arrived" vessel, "ready to load", within the meaning of Clause 6. That question is, however, academic, because the NATIONAL PEACE was in fact *not* on a Saudi Arabian or *any* blacklist when she arrived at Ras Tanura, and so far as was known, even to the Government's own witnesses, *no* vessel, of *any* flag, had ever before been refused permission to load at *any* Persian Gulf port. R. 149-153; 202; 372-373.

It is inferable from the record that what caused the delay on this one occasion is that the Iraqi and Lebanese authorities had circulated among the other Arab League governments copies of their orders placing the *Liberian* MEMORY on *their* blacklists; that the Saudi Arabian "health officer" at Ras Tanura learned from the logs that the NATIONAL PEACE had been formerly called "MEMORY" and had called at Israel under that name, and that he confused the NATIONAL PEACE with the *Liberian* MEMORY. The decisions below with respect to the questions of "readiness" would thus appear to hold that an American flag vessel which formerly bore the same name as a foreign flag vessel owned by an affiliated company and placed on a blacklist by two Arab League countries (Iraq and Lebanon) cannot be considered "ready to load" and an "arrived" vessel when she arrives at her loading berth in a third Arab League country (Saudi Arabia), if events subsequently prove that there then existed the possibilities, 1.) that the Iraqi or Lebanese authorities might have notified the Saudi Arabians about their blacklisting of the foreign flag vessel; 2.) that the Saudi Arabian "health officer" might call for the production of old log books revealing the American vessel's former name; 3.) that the health officer might discover the change of name from the old logs, and might

erroneously conclude that the American flag vessel is the one on the Lebanese and Iraqi blacklists; 4.) that the Saudi Arabian officials might therefore order the vessel not to load; and 5.) the order might not be rescinded by the "cancelling" date stipulated in the Charter.

It is submitted that the question of "readiness to load" cannot be approached in retrospect; it must be answered in terms of the conditions existing at the moment the NATIONAL PEACE was made "all fast" at South Pier. She was not then on any blacklist. No vessel had ever been refused permission to load in the Persian Gulf because of a prior call at Israel. She was under no "disability" rendering it impossible for her to perform her intended voyage. She had violated no law that she was under any duty whatsoever to obey. She was unquestionably seaworthy, and the health of her crew was excellent. She had on board an ample supply of bunkers for a vessel expecting to load in an area where bunkers can normally be replenished cheaply. The NATIONAL PEACE was "ready to load" in every sense of the term as employed in the Charter, when she was made "all fast".

The order preventing loading, which was issued a short time later, resulting, as it quite probably did, from a case of mistaken identity, could no more be related back to the moment the NATIONAL PEACE was "all fast" than could a casualty occurring an hour or two after "all fast," which might make it impossible to commence loading before the "cancelling" date.

If, contrary to Petitioner's contentions, the Courts below did not err in holding that the NATIONAL PEACE was not an "arrived" vessel, "ready to load," when she was "all fast" at her loading berth, and that the option to cancel therefore remained alive, it would follow that Ras Tanura was not a "safe" port for the NATIONAL PEACE, and MSTS should have nominated an alternate Persian Gulf oil loading port where the Vessel could have safely "arrived" and loaded.

It is a fundamental principle of the law of charter parties, long established by the decisions of this Court, that a "safe" port or berth is one which is "safe", not just for some vessels, but for the particular vessel which has been chartered. Thus, if the port to which the chartered vessel is ordered is one which *some* vessels can safely enter, but which the chartered vessel cannot, because of her deep draft, the port is not a "safe" port. *The Gazelle,* 128 U. S. 474 (1888). If the berth to which the chartered vessel is ordered is one which *some* vessels can reach without difficulty, but which the chartered vessel cannot, because her unusually high mast will not clear a bridge which must be cleared to reach the berth, it is not a "safe" berth. *Mencke* v. *A Cargo of Java Sugar,* 187 U. S. 248 (1902).

Where, as here, the charterer is given the option of loading at any one or more "safe" ports in a wide area, such as the Persian Gulf, there is no representation by the shipowner that his vessel can safely enter every recognized port in the area; on the contrary, the charterer undertakes to select one or more ports which are safe *for the chartered vessel.* See *The Gazelle, supra.* The obligation to select a safe port is an undertaking wholly independent of any question of negligence on the charterer's part. *Eastern Massachusetts Street Ry. Co.* v. *Transmarine Corp.,* 42 F. 2d 58 (1st Cir. 1930).

If MSTS had ordered the vessel to load at a Persian Gulf port which smaller tankers, but not the NATIONAL PEACE, could enter safely, MSTS would plainly have had no right to cancel, but would have been required to nominate an alternate port which was "safe" for the NATIONAL PEACE.

That the knowledge of the Israeli call may have been one-sided is of no consequence, any more than the fact that in cases like *The Gazelle, supra,* and *Mencke* v. *A Cargo of Java Sugar, supra,* the knowledge of the vessel's physical

peculiarities is usually known only to the ship owner when the charter is made.

In this, as in all charter parties calling for loading at one or more "safe" ports, the word "safe" means politically, as well as physically safe. See *Robert Dollar Co.* v. *Blood, Holman & Co.*, 4 Lloyd's L. R. 343 (K.B. 1920); Scrutton on Charterparties (17th ed. 1964), p. 112; 2 Carver on Carriage of Goods by Sea (11th Ed., 1963—3 British Shipping Laws), p. 814; Poor on Charter Parties (4th ed. 1954), p. 18.

The descriptive word "safe" did not appear before the words "port or ports" in the "invitation to Bid" (Pan Cargo Exh. 2), which was in extremely abbreviated form; it appeared in writing for the first time when the chartering brokers prepared the formal document on MSTS' own form. However, with respect, the Trial Court was in error in finding that the "word 'safe' was not part of the provisions to which the Navy agreed at the time the charter was fixed". The fact is that it *was* part of those provisions; MSTS' own negotiator testified that if the word "safe" had not been included in the Charter, it would have been implied. R. 118.

MSTS concedes that the formal Charter, which employs the term "safe port or ports", correctly reflects the agreement of the parties. R. 549. The prior negotiations thus became merged in the formal agreement, and evidence concerning them was not properly admissible unless there was ambiguity in the language employed.

Here there was no such ambiguity. The charter party term "safe" as applied to ports or berths is a word of art with a well-recognized meaning in law.

The Master of the NATIONAL PEACE had little choice but to leave the pier as ordered, and it is patent that his refusal to do so would have been answered with force. Surely, in order to have Ras Tanura characterized as politically unsafe, it would not have been necessary for the Master to

disobey the order to proceed to an anchorage until Saudi Arabian military personnel forced him to proceed. See *The Claveresk*, 264 F. 276 (2d Cir. 1920).

Clause 6 of the NATIONAL PEACE Charter expressly provided that laytime was to commence immediately upon the Vessel being made "all fast", whether or not a notice of readiness had been given, and since she was "all fast" at 2230 hours, December 17th, laytime began to run at that moment. Once the allowed laytime expired, the vessel went on demurrage, which continued to accrue until the cancellation of the Charter.

Clause 19 had no effect whatsoever on the running of laytime. Since it provided that MSTS was not to be relieved of its obligation to pay any sums due to Petitioner under other provisions of the Charter, it expressly obligated MSTS to pay demurrage once laytime expired, even in the event of a delay due to any of the causes enumerated in Clause 19, including a "restraint of princes".

Even without such an express provision, it is clear that under American law a "general exceptions clause" has no effect whatever on the running of either laytime or time on demurrage. *Yone Suzuki* v. *Central Argentine Ry.*, 27 F. 2d 795 (2d Cir. 1928); *Continental Grain Co.* v. *Armour Fertilizer Works*, 22 F. Supp. 49 (S.D.N.Y. 1938); see *United States* v. *Atlantic Refining Co.*, 112 F. Supp. 76 (D.C.N.J. 1951). See, also, *Cantiere Navale Triestina* v. *Russian Soviet Naphtha Export Agency* [1925] 2 K.B. 172, 21 Lloyd's L.R. 204 (Court of Appeal, 1925), where the Court concluded that nothing in the "general exceptions clause" interrupted the running of laytime, even during the time the chartered vessel was absent from the loading port on account of a ban on loading and an order to leave, under circumstances somewhat similar to those existing here.

Although the action of the Saudi Arabian authorities in refusing permission to load was a "restraint of princes"

relieving both parties of liability for any *damages* resulting from the delay, under the cited decisions it did not prevent the running of either laytime or time on demurrage.

Both Petitioner and MSTS were placed in a most unfortunate position by the arbitrary, unreasonable and insolent actions of the Saudi Arabians. In these circumstances, the terms of the governing contract (here the Charter) must of course determine which party must bear the loss. By those terms, MSTS agreed that its option to cancel could no longer be exercised if the vessel arrived at loading port, "ready to load", as the phrase was defined in the Charter, by 4 P.M. on January 5, 1958. The NATIONAL PEACE did arrive, so ready, the night of December 17, 1957, and MSTS' option to cancel thereupon expired.

While it might have been expensive for MSTS to have kept the vessel waiting on demurrage until the ban on loading could be lifted, or to have purchased a cargo to be loaded on the NATIONAL PEACE at Abadan or some other Persian Gulf port where the vessel could have been loaded without local Governmental interference, nevertheless MSTS made its agreement and must be held bound by it.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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